Docket No. 16008

United States Court of Appeals

For the Ninth Circuit

SKOKOMISH INDIAN TRIBE, *Appellant,*

vs.

E. L. FRANCE, TRUSTEE, *et al., Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLANT SKOKOMISH INDIAN TRIBE

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OPINION BELOW

The Court's oral decision in District Court Cause No. 1183 is found in the Transcript of Record commencing at page 129 and the Order of Dismissal is found in the Transcript of Record commencing at page 132.

JURISDICTION

Jurisdiction is based on U.S.C. Title 28, §1331, in that the amount in controversy exceeds $3,000.00 and the interpretation of a treaty is involved [12 U.S. Statutes at Large, 933, See Appendix] and on U.S.C. Title 28, §1345, in that the proceeding is one commenced by an agency or officer of the United States expressly authorized to sue by Act of Congress.

STATEMENT OF PLEADINGS

The Complaint in this action was filed on the 3rd day of December, 1948, in the District Court of the United States for the Western District of Washington, Southern Division. On the 17th day of February, 1949, the

United States of America, originally named in the Complaint as a defendant, was dismissed upon Stipulation, that Stipulation being made upon the mutual understanding that Bonneville Power Administration had no interest in the land in question. The Order dismissing the United States pursuant to this Stipulation was entered on the 17th day of March, 1949, and subsequently Motions to dismiss were made by a number of the defendants, the grounds presented by these Motions being as follows:

1. There is another action pending.
2. The Complaint does not state facts sufficient to constitute a cause of action.
3. Laches.
4. Adverse possession.
5. The statute of limitations has run.
6. The Complaint fails to state a claim upon which relief can be granted.
7. The District Court lacks jurisdiction over the subject matter, and the person of the plaintiff, and the amount actually in controversy is not alleged to exceed $3,000.
8. The plaintiff does not have capacity to sue, being an Indian Tribe not represented by the Government of the United States.

By Order of William J. Lindberg, District Judge, dated the 16th day of July, 1952, these various Motions to Dismiss were denied. Judge Lindberg's Memorandum Opinion and Order denying the Motions to Dismiss appear at page 47 of the Transcript of Record. Pre-trial conferences were then had and a pre-trial Order was entered on the 1st day of October, 1956,

signed by GEORGE H. BOLDT, District Judge [Transcript of Record, pages 80-116, inclusive].

Following the entry of the pre-trial Order, the District Court required the parties to submit additional briefs concerning the following contentions of the defendant:

1. There is a defect of parties plaintiff herein [Defendants' contention 24, Transcript of Record, page 93].
2. Court is without jurisdiction of the sovereign State of Washington, it not having consented to be sued in this Court nor waived its immunity from suit [Defendants' contention 25, Transcript of Record, page 93].
3. A prior action to quiet title to part of the lands which are the subject matter of the action has been previously instituted in a Superior Court of the State of Washington, which Superior Court has prior and exclusive jurisdiction [Defendants' contention 28, Transcript of Record, page 95].
4. The Court is without jurisdiction of this action and of the defendants or any of them, the value in controversy, exclusive of interest and costs, does not amount to $3,000.00 as to any one of the defendants or his marital community [Defendants' contention 30, Transcript of Record, page 96].

Following the submission of briefs and further hearing on these contentions, the Court entertained a Motion of plaintiff to amend its Complaint for the purpose of adding the United States of America as an additional party plaintiff, which Motion the Court overruled. The District Court, on December 6, 1957, entered its formal Order dismissing the action, stating as follows:

"Ordered:

"1. The motion of plaintiff to add the United States of America as an additional party plaintiff be and the same is hereby denied.

"2. The motion of the State of Washington to be dismissed for want of consent to be sued is granted.

"3. As to the balance of the litigation, there is want of jurisdiction in the court to hear and try the issues and the action is hereby dismissed without prejudice.

"4. Exception is allowed the plaintiff as to each and all of the above rulings."

QUESTIONS PRESENTED

1. Is there a defect of parties plaintiff herein?
2. Is the District Court without jurisdiction of the State of Washington?
3. Is the District Court without jurisdiction of the action since a prior action to quiet title to part of the lands which are the subject matter of this action has been previously instituted in the Superior Court of the State of Washington, for Mason County?
4. Does the District Court lack jurisdiction on the grounds that the value in controversy does not amount to $3,000.00?
5. Has the State of Washington not consented to be sued in this matter?
6. Is the United States of America a necessary party?
7. Is the United States of America an indispensable party?
8. Is the United States of America not an indispensable party?
9. Does the District Court have jurisdiction to try the matter on its merits as to the balance of the litigation?

10. Does the District Court have jurisdiction of the subject matter and all of the parties to the action whether or not the State of Washington is a party defendant?

STATEMENT OF THE CASE

This is a trespass and quiet title action brought by the Skokomish Indian Tribe against all claimants to certain tide lands located at the head of Hood Canal in the State of Washington. The Territory of Washington was created by an Act of Congress in 1853 [10 U.S. Statutes at Large, Chapter 90, page 172]. Two years later, the United States entered into a Treaty with the S'Klallams Indians and with the Skokomish or Twanoh Tribe creating the Skokomish Indian Reservation [12 U.S. Statutes at Large, 933; Ratified and Proclaimed 1859]. The Treaty of 1855 specifically reserved to the tribe six sections of land at the head of Hood Canal and likewise reserved fishing rights at the usual and accustomed grounds. By the treaty the uplands, together with the shorelands in Hood Canal became and were reserved to the exclusive use, benefit and occupancy of the Skokomish Indian Tribe, together with the exclusive right for the use of the bed of Hood Canal and all tidelands touching upon or bordering the Reservation, along with the exclusive right to fish in all waters bordering upon the Reservation including tidal waters. These treaty rights were to be free from interference from the then Territory of Washington or any persons claiming under or by virtue of any title from the Territory of Washington (subsequently the State), subject only to the exclusive jurisdiction of the United States.

An Executive Order of President Grant in 1874 set aside the Skokomish Reservation by metes and bounds description, withdrawing said land from sale or other disposition. The Executive Order was in line with the intent and purpose of the Treaty to encourage the Skokomish Tribe to reside at one place on a Reservation set aside for their use and occupancy so selected as to be sufficient for the Tribe's wants and needs that then existed and would continue to exist in the future. Thus the Treaty took into consideration the fact that these Indians sustained themselves to a great extent from the tidal waters flowing and ebbing in Hood Canal where could be found an excellent source of many kinds of shellfish. In 1889 Washington became a State and adopted its Constitution. Following statehood, the State of Washington wrongfully asserted ownership and retained the same unto itself or granted by lease, conveyance or otherwise, to defendants named herein or their predecessors claims of right to the tide lands which form a part of the land reserved for the tribe by treaty. The Skokomish Indian Tribe incorporated under the Act of Congress of June 18, 1934 [48 U.S. Statutes at Large, 984; 25 U.S.C. 476], as amended by the Act of June 15, 1935 [49 U.S. Statutes at Large, 378], and has brought this action in its corporate right.

SPECIFICATION OF ERRORS

Appellants rely upon the following errors of the Court below:

"1. The Court erred in denying plaintiff's motion to make the United States a party.

"2. The Court erred in granting the motion of the

State of Washington to be dismissed for want of consent to be sued.

"3. The Court erred in ruling that as to the balance of the litigation there was want of jurisdiction in the Court to hear and try the issue.

"4. The Court erred in ruling that the United States is an indispensable party in this proceeding, or in the alternative, in refusing to rule that the United States is not an indispensable party.

"5. The Court erred in refusing to rule that it had jurisdiction of the subject matter and of all the parties to the action save the State of Washington and therefore had jurisdiction to proceed with the trial of the action as to such other parties despite the dismissal of the State of Washington.

"6. The Court erred in dismissing the action of the plaintiff."

ARGUMENT

I.

The District Court Should Have Found that the United States Is Not an Indispensable Party Insofar as This Action Is Concerned, but That It Is a Necessary Party

The first and fourth points set forth in appellants' specification of errors concern the United States as a party to the proceedings. These two points are so completely interwoven that a joint discussion of them not only will be more expeditious but will be cohesive and more clearly understood.

To understand the relationship of the United States to the Skokomish Indian Tribe and to comprehend this problem of the position that the United States should

play in this action, it is essential to approach the solution with certain well-founded concepts of Indian Law in mind.

The rights of an Indian Tribe in land occupied by it within the boundaries of the United States are absolute rights which are encumbered only by the restrictions put upon them since the coming of the White man. This aboriginal right of the Indian Tribes is indeed a higher title than a fee simple title free and clear of all encumbrances since the Indians enjoy many freedoms and immunities which are not available to White citizens. Encompassing and fencing in these free aboriginal rights are State Constitutions and United States Treaties which encircle the untouched islands of Indian right as a dammed stream encircles high ground but leaves it dry. It is essential to view the problem of the United States as a party to this action affecting Indian land in the light of this basic premise.

In Article I, Sec. 8, Clause 3, of the Constitution of the United States, Congress was given the power to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes. In the preamble of the Organic Act [10 U.S. Statutes at Large, Chap. 90, Page 172], creating the Territorial Government of Washington, which was approved March 2, 1853, we find:

> "Provided, That nothing in this act contained shall be construed to affect the authority of the government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been com-

petent to the government to make if this act had never been passed . . ."

It will be noted that the philosophy of the Organic Act recognizes that the creation of the Territory in no way affected the rights of the Indians living within that Territory, who remain free to deal directly with the Federal Government without being subject in any degree to the jurisdiction of the newly-created Territory insofar as their lands were concerned.

The Enabling Act [25 U.S. Statutes at Large, Chap. 180, Page 676, 1889], enabling the people of North Dakota, South Dakota, Montana and Washington to form Constitutions and State Governments and to be admitted into the Union on equal footing with the original states imposed the following restriction as a condition of statehood:

"Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian Tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . . that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any In-

dian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe."

As a part of the Constitution of the State of Washington, adopted by the people of Washington on May 14, 1889, the State compacted with the Federal Government in line with the Enabling Act by adopting the quoted provision of the Enabling Act verbatim in Article XXVI, Sec. Second, of the Washington State Constitution. Thus we find as a part of the original sacred contract by which Washington became a State, that the State acknowledges that it and its people must forever keep hands off Indian lands and acknowledges that said Indian lands are under the absolute jurisdiction and control of the Federal Government. The title to Indian lands remains subject to the disposition of the United States, which is the only entity which can extinguish title and the United States retains jurisdiction until valid conveyance of title.

Previous to Statehood, the United States had entered into the Treaty with the Skokomish Indians on the 26th of January, 1855. Articles III and IV of that Treaty entered into between the United States and the sovereign tribe read as follows:

"Article 3. The said tribes and bands agree to remove to and settle upon the said reservation

within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime, it shall be lawful for them to reside upon any lands not in the actual claim or occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

"Article 4. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. PROVIDED, however, that they shall not take shellfish from any beds staked or cultivated by citizens."

By Executive Order signed February 25, 1874, the boundaries of the Skokomish Reservation were further delineated. That Executive Order is as follows:

"SKOKOMISH RESERVATION

"Executive Mansion, February 25, 1874.

"It is hereby ordered that there be withdrawn from sale or other disposition and set apart for the use of the S'Kallam Indians the following tract or country on Hood's Canal, in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal, reserved by treaty with said Indians January 26, 1855 (Stat. L. vol. 12, p. 934), described and bounded as follows: Beginning at the mouth of the Skokomish River; thence up said river to a point intersected by the section line between sections 15 and 16 of township 21 north, in range 4 west; thence north on said line to a corner common to sections 27, 28, 33, and 34 of township 22 north, range 4 west; thence due east to the south-

west corner of the southeast quarter of the southeast quarter of section 27, the same being the southwest corner of A. D. Fisher's claim, thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said section 27; thence east to the section line between sections 26 and 27; thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning."

"U. S. GRANT."

The Washington State Supreme Court has often acknowledged the separate status of Indian Reservation Land as that status is circumscribed by the United States Constitution, Treaty, the Organic and Enabling Acts and the Washington State Constitution. The concept flowing from these documents which sets apart reservation land is important in understanding the part that the United States plays with relation to the Skokomish Tribe and the Reservation granted it by treaty. Under those documents, the State of Washington has no power, authority or jurisdiction over the land and cannot be said to be an intermediary between the tribe and the Federal Government insofar as the lands are concerned. No decision can be made concerning the role that the United States should play now that a conflict has risen between the Skokomish Tribe and the State of Washington without recalling that the State has conceded the absolute power of the Federal Government to exercise a paternalistic jurisdiction and authority over these lands. Such a paternalistic authority carries with it the correlative duty to protect the Skokomish Tribe from a breach of the sacred contract made between the State and the Nation for the protection of a beneficiary

Indian Tribe. We submit that in light of this duty, the United States cannot repudiate the Skokomish Indian Tribe by refusing to be a party to this action.

The Washington Supreme Court has long recognized the primary paternalistic relationship which the United States bears to the Indian Tribes which have been set apart on the Reservations by treaty. *Pioneer Packing Co. v. Winslow,* 159 Wash. 655, 294 Pac. 557 (1930), involved the right of the Quinault Indian Tribe to sell fish in the Quinault River in interstate commerce, unrestricted by the game laws of the State of Washington. The Washington Court stated that Federal Courts had often held that where there is a ceding and reservation under a treaty of the kind there and here involved, the Indians hold the lands subsequently designated in the Executive Order in the same title and with the same right as they previously owned the entire area ceded. In the *Pioneer Packing* case, the Washington Court cited *United States v. Romaine,* 255 Fed. 253, which stated that under a history similar to the one there, and here involved, the Indians held under their original title. The Court said:

> " 'It is not to be supposed that in making the treaty the government intended to take from the Indians any of the rights they had theretofore enjoyed . . . In the Enabling Act, by which the territory of Washington was admitted into the Union (Act Feb. 22, 1889, c. 180 §4, 25 Stat. 676), the people of the newly created state were required to agree and declare that they forever disclaim all right and title — "to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by

> any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.'' ''

In *State v. Edwards,* 188 Wash. 467, 62 P.(2d) 1094 (1936), two Indians were charged with trapping fish outside of their reservation in violation of State law. The question presented was whether or not the traps were within the Indian Reservation. The treaty with that tribe was likewise entered into in 1855 and one of the boundaries of the reservation therein involved was fixed as the ''low water mark.'' The Court held that since this term was used in a treaty with the Indians it would not be construed in its technical meaning but in such way as the Indians themselves would understand it. In the *Edwards* case the Washington court said:

> ''The Indian tribes within the limits of the United States are not foreign nations; though distinct political communities, they are in a dependent condition; and Chief Justice Marshall's description, that 'they are in a state of pupilage,' and 'their relation to the United States resembles that of a ward to his guardian,' has become more and more appropriate as they have grown less powerful and more dependent. . . . ''
>
> ''In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representa-

> tives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians. *Worcester v. Georgia,* 6 Pet. 515; *The Kansas Indians,* 5 Wall. 737, 760; *Choctaw Nation v. United States,* 119 U.S. 1, 27, 28. *Jones v. Meehan,* 175 U.S. 1, 20 S.Ct. 1."

The Federal Government itself may restrict or limit Indian title but it is the sole entity which may do so. The Federal Government is the Guardian of the Independent Sovereignties which the Indian Reservations are, and neither a State nor its citizens in any manner may transfer or encumber Indian land. As stated in the recent case of *State v. Quigley,* 152 Wash. Dec. 192 (1958), quoting from the words of Chief Justice Marshall in *Johnson v. M'Intosh,* 8 Wheat. 543, 5 L.Ed. 681,

> " . . . the exclusive right of the United States to extinguish Indian title has never been doubted. . . . "

The State of Washington has here endeavored to extinguish Indian title by conveyance and by asserting

an ownership of it. When such a situation arises, we fail to see how the United States can claim that it is not a proper party to an action brought by the Indians to protect their lands when the United States has given its solemn promise to protect said land and set it apart in its treaty with the tribe and carried forth that promise by requiring the State of Washington to acknowledge Indian right in its Constitution. See *Worcester v. Georgia,* 6 Pet. 515, 31 U.S. 515, 8 L.Ed. 483 (1833), and *Iron Crow v. Oglala Sioux Tribe,* 231 F.(2d) 89 (1956).

Member states of the union have no right to the lands reserved to the Indians. *U. S. v. Jacobs,* 113 F.Supp. 203 (1953). Indian Nations are separate sovereignties whose lands by the happenstance of geography are within the boundaries of states. *Iron Crow v. Oglala Sioux Tribe, supra.* When the reservation of Indian lands reserved to these separate sovereignties who are dependent upon the United States are encroached upon by a reckless state government, the United States owes a duty to protect the weak dependent Indian Nation. Indeed this duty arises from the contractual obligation created by treaty and from the legal and moral obligation of a great power to a subjugated one. The United States is the sole governmental unit which may extinguish Indian title [*State v. Quigley,* 152 Wash. Dec. 192 (1958); *Hynes v. Grimes Packing Co.,* 337 U.S. 86, 93 L.Ed. 1231 (1949)] and indeed, when a state chooses to infringe upon that right of the Federal Government, it ill behooves the Federal Government not to protect its right, the right given to it in good faith by subjugated people.

To perform its responsibility, the United States must be a party to this action.

This argument is bolstered by the decision of the District Court for the Western District of Washington in *Corrigan v. Brown,* 169 Fed. 477 (1907). That case concerned itself with the interpretation of a treaty entered into in 1855 creating the Swinomish Reservation. In passing, we note how many of these treaties were entered into in the same decade by the Federal Government with the Indians of the Puget Sound country. It stands to reason that the interpretation of these treaties should be uniform, the relationship between the Government and the Indians should be the same and the responsibility of the United States towards the tribes should be as imperative in one situation as another. In the *Corrigan* case the District Court was faced with the interpretation of a treaty as to whether or not tidelands there in dispute were part and parcel of the land reserved to the Indians. All the merits of the question presented in that case are the same as those presented here. Resting its decision upon the disclaimer found in the compact, which is a condition of statehood and admission into the Union and which is found in the Washington State Constitution, the court said:

> " . . . The disclaimer of the state contained in the Constitution adopted by the people applies to all lands within the boundaries of Indian reservations to which the primary right of occupancy of the Indians has not been extinguished. By the treaty made with the Indians in 1855, land was reserved for the exclusive use of the tribe or band of Indians to which the defendants belong, and by the President's order made in 1873 the boundaries

> of the reservation were precisely established, so that the reservation includes all the land above the line of low water. Therefore, beyond any question, this tract of land is entirely within the boundaries of a reservation to which the rights of the Indians have never been extinguished, and it is comprehended by the disclaimer in the state Constitution . . . "

The United States accepted its responsibility as guardian of the Indian Tribes, appearing through the Attorney General in *United States v. Stotts,* 49 F.(2d) 619 (1930). That case likewise dealt with tidelands which were a part of an Indian Reservation and reiterated that the Indians' right of occupancy is not predicated upon a grant of the United States but is a reserved aboriginal right which the Indians inherently held in the land segregated and withheld from the territory ceded by the Indians under treaty. Likewise, the case reiterates that the Enabling Act allowing the creation of the State of Washington expressly disclaims any interest in Indian lands. Here, as in case after case, the philosophy is expressed that Indian treaties are to be liberally construed, to the end that the Indians will retain the benefits conferred by their treaties at the time of each treaty's execution, and in so construing the treaty, it is recognized that the Indians were dependent upon the tidelands along the extremities of their Reservations and that these tidelands must, of necessity, be part and parcel of the impregnable Indian right. To hold otherwise would be to derogate from that purpose for which the land was originally reserved, the creation of a place where the Indian could continue to make a living

in the environment to which he was accustomed and adapted.

In interpreting the treaty, we are bound by the rule that we must approach the problem as a matter of exclusion rather than inclusion with the burden resting on him who would exclude, since the presumption must be that the land is included in the Reservation. The same premise follows where the representation and support of the United States is concerned. It should be presumed that the United States would be a proper party plaintiff, assuming its fiduciary duty to protect its wards rather than neglecting that duty and assuming its duty to uphold the high contract, the Treaty of 1855, against the state that would impair the performance of that obligation. We are asking the United States to assume its duty and appear as a party plaintiff.

This duty to join with the Indian in protecting his rights to Reservation lands is obvious when we consider that the purpose of the Reservation was to provide for the Indian an area upon which he could live and from which he could gain his sustenance. The merits of this case deal with whether or not certain shellfish yielding tidelands are part of the Reservation set aside for the Skokomish Indians. By the Treaty of 1855 the Skokomish relinquished their rights and claims to land outside the Reservation. In return therefor they achieved an uncontested right to an area which would furnish them food. The passage of over a hundred years since the execution of that treaty does not absolve the United States of its duty to uphold it. As was said in *Moore v. United States,* 157 F.(2d) 760 [CCA 9] (1946):

> "The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was completely essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation . . . "

The Skokomish likewise looked to the shellfish of Hood Canal from which to gain their sustenance and the Skokomish look to the United States to assist in preserving their means of livelihood by joining with them as a party to this action.

That a guardian should appear on behalf of its ward in an action involving the property of the ward is a maxim which does not require citation. The finding that the legal relationship of guardian and ward exists between a particular Indian Tribe and the United States depends upon the express provisions of the treaty, executive order or statute under which a claim arises. *Gila River Pima-Maricopa Indian Community v. United States,* 140 F.Supp. 776 (1956). The court said in *Seminole Nation v. United States,* 316 U.S. 286, 86 L.Ed. 1480 (1942):

> "Furthermore, this court has recognized the distinctive obligation of trust encumbent upon the government in its dealings with these dependent and sometimes exploited people [citing cases]. In carrying out its treaty obligations with the Indian tribes the government is something more than a mere contracting party. Under a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this court, it has charged itself with moral obligations of the highest responsibility and trust. Its

> conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."

Looking then at the treaty between the United States and the Skokomish Indians entered into in 1855 and found in 12 Statutes at Large 933 (see Appendix) to ascertain the relationship between the United States and the Skokomish, we find these words:

> "Said tribes and bands acknowledge their dependence on the Government of the United States."

We do not feel that the United States can wash its hands of this affair and turn its back on the Skokomish Tribe which needs its help and support. For the United States to do so is for it to neglect its duty and moral obligation as guardian in an unconscionable manner. As was said in *United States v. Payne,* 264 U.S. 447, 68 L.Ed. 782 (1924):

> "They are an unlettered people, unskilled in the use of language . . . with regard to whom the United States occupies the position and assumes the responsibilities of virtual guardianship, bound by every moral and equitable consideration to discharge its trust with good faith and fairness."

In the very recent case of *Squire v. Capoeman,* 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883 (1956), Chief Justice Warren stated the question to be whether the proceeds of sale of standing timber on lands of an Indian Reservation could be subject to capital gains tax consistently with the applicable treaty and the government's role as the Indians' trustee and guardian. The Federal Gov-

ernment there urged the Supreme Court to disregard the treaty and the guardian-ward relationship between the United States and the Indians. In finding that the Internal Revenue Acts must yield to the treaty the court quoted from an opinion of the Attorney General which stated in part:

> "[U]nable, by implication, to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rests largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian."

Therefore, the United States owes a duty to the Skokomish Tribe to preserve and uphold the treaty and it owes a duty to the dependent tribe of guardianship of the tribe's reserved rights.

What then is the position of the United States? Is it a necessary party in this action, an indispensable party, or neither of these and completely unnecessary as a party at all? The answer to that question lies in the premises we have set forth above and the relationship of the United States to the lands here involved.

This is an action by an incorporated Indian tribe to quiet title to lands reserved free and clear of the interests of other governments when the larger parts of the aboriginal rights to its more extensive area were ceded

to the United States by treaty. This, therefore, is not an action concerning the United States in a proprietary capacity, but one which concerns it in its governmental function and relationship with this Indian Tribe. In this action brought by the Skokomish Indians, the Tribe is not endeavoring to alienate or encumber its Reservation land in any manner, but to remove conflicting claims to that land. Under these facts, the United States is not an indispensable party but is a necessary party.

In *Minnesota v. United States,* 305 U.S. 282, 83 L.Ed. 235 (1939), condemnation by the State of Minnesota of reserved Indian lands was involved. Justice Brandeis, speaking for the court, held that the United States was an indispensable party defendant to the condemnation proceeding since it involved property in which the United States had an interest and therefore was a suit directly against the United States. This holding was based upon the finding that the United States held the fee to these allotted lands *in trust* for the Indians. The Skokomish Indian Tribe was incorporated pursuant to legislative authority and has power to sue in its own name and in its own behalf, so the United States is *not* an indispensable party but this does not mean that the United States is not necessary. *McCauley v. Makah Indian Tribe,* 128 F.(2d) 867 (1942).

The United States has muniments of title to the Skokomish Reservation only through the Treaty and is a guardian for the tribe and not a trustee of the land itself. *United States v. State of Washington,* 233 F.(2d) 811 (1956), involved a legal trust interest in certain Indian lands themselves and not a fiduciary relationship

of guardian and ward. There the Government was found to be the real party in interest in prosecuting an action to quiet title to the land in question for the benefit of individual Indian wards, since the individual Indian wards founded their claim upon a trust patent, the United States being trustee. See also *First National Bank of Holdenville v. Ickes,* 154 F.(2d) 851 (1946); *Neff v. Newcomer,* 307 P.(2d) 148 [Okla.] (1957); *Gibbs v. Oklahoma Turnpike Authority,* 285 P.(2d) 190 [Okla.] (1955).

The mere fact that the United States may be guardian for an Indian tribe does not make it trustee of its lands. The title to Indian land may remain in the Indian tribe, as with the Skokomish, and spring from the treaty concerning the Reservation although the power of the tribe is subject to congressional control. *Toledo v. Pueblo de Jemez,* 119 F.Supp. 429 (1954). This congressional power over the tribe itself does not necessarily mean that the United States is trustee of the land of the Indian tribe, but only that it is guardian of the tribe itself.

The distinction is spelled out in *United States v. Candelaria,* 271 U.S. 432, 70 L.Ed. 1023 (1926), and *Choctaw and Chickasaw Nations v. Seitz,* 193 F.(2d) 456 (1951). The *Candelaria* case presented the question whether Indians in New Mexico were in such status of tutelage as to their land that the United States, as guardian, was not barred by a judgment in a suit involving title to the lands. Answering this query, the court stated that the Indians were wards holding their lands subject to the restriction that said land could not be alienated without the consent of the United States.

Therefore, a judgment or decree which would operate to transfer the lands from the Indians, where the United States had not authorized or appeared in the suit, would infringe the restriction and the United States would not be barred by the action. The Skokomish Indian Tribe holds its Reservation land in the same manner and in the event that the United States is not made a party to this case, certainly the United States will not be barred by any result of the action. The *Seitz* case was an action by the Indian Nations to recover possession of, and establish title to, certain lands. Individual defendants had filed a motion to dismiss the Indian complaint on the ground of the non-joinder of the United States as a party. The court stated that by reason of its guardianship and its governmental interest in the lands, the United States would not be bound by a judgment in the action unless it became a party thereto, but that the United States was not an indispensable party. It defined indispensable party as follows:

> "An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience."

The court pointed out in view of the guardianship of the United States, that it would not be bound by a judgment in which it was not joined, but held that the Indian tribes had been given scope to prosecute or defend actions with respect to their lands on their own behalf so completely that the United States was not an indispen-

sable party and the Indian tribes could maintain such action on their own. When Congress granted to the Indian tribes the power to incorporate, by virtue of the Act of 1934 (48 U.S. Statutes at Large 984) it gave to the Indian tribes incorporating under that act the power to protect their rights whether or not the United States chose to assume its responsibility. So the Indian tribes are not at the whim of the United States as to whether or not they may protect their rights in Federal Court and they may come forth and do so alone. However, though the United States may be dispensed with initially as a party plaintiff, this does not mean that they are not necessary to the action. The *Seitz* case distinguished *Minnesota v. United States, supra,* and *Town of Okemah v. United States,* 140 F.(2d) 963, stating that those were actions to condemn lands belonging to Indians, the title to which was held *in trust* by the United States; that the effect of a judgment in those actions would have been an alienation of the land. It was pointed out that the effect of a judgment in favor of the Indians in the *Seitz* case would establish the title of the Indians to the land and give them possession and use thereof. Concluding, the court stated, in part, as follows:

> " . . . If we hold that the United States is an indispensable party, the Nations will be unable to assert their longstanding claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment in their favor in the instant action.
>
> "We are of the opinion that the equities presented by the situation and the inconveniences that

> will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder of the United States, weigh heavily in favor of the Nations."

See also *Skelly Oil Co. v. Wickham,* 202 F.(2d) 442 (1953); *Gerard v. United States,* 167 F.(2d) 951 (1948); *Hansen v. Hoffman,* 113 F.(2d) 780 (1940), and *Osage Tribe v. Ickes,* 45 F.Supp. 179 (1942). This is precisely the situation here. To hold that the United States was an indispensable party would be to leave the Skokomish Indian Tribe at the mercy of the State of Washington and its citizens.

If the United States is not an indispensable party, is it a necessary party and therefore one that should have been joined in the action? Rule 19, Federal Rules of Civil Procedure, 28 U.S.C.A. 56, reads in part as follows:

> "(a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases an involuntary plaintiff.
>
> "(b) *Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order

> them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

We call attention to the statement concerning the joinder of the United States as a necessary party made by Judge Boldt in his oral decision (Transcript of Record Page 121).

A necessary party is a party that will be affected by the judgment and against which, in fact, a judgment will operate. *West Coast Exploration Co. v. McKay,* 213 F.(2d) 582 (1954). A necessary party is an entity that has an interest in the subject matter and should be made a party in order finally to determine the entire controversy but whose interest is separable. *Dunham v. Robertson,* 198 F.(2d) 316 (1952); *Kuhn v. Yellow Transit Freight Lines,* 12 F.R.D. 252 (1952); *Savoia Film v. Vanguard Films,* 10 F.R.D. 64 (1950). In *United States v. Hellard,* 322 U.S. 363, 88 L.Ed. 1326 (1944), partition proceedings were instituted in which the United States was not a party. The partition action was concluded in state court and following the partition action, a quiet title action was likewise commenced in state court against the Indian heirs. The United States removed the cause to the Federal District Court and alleged that the partition action was void for lack of the United States as a party. The court contrasted heirship

and partition proceedings pointing out that in proceedings to determine heirship, no governmental interest is directly involved since there is no alienation from Indian ownership. The court reiterated the rule that where an Indian's interest is alienated by judicial decree, the United States may cancel the judgment and set the conveyance aside where it is not a party to the action. Mr. Justice Douglas speaking for the court, pointed out that where governmental interests are involved, the United States has long been considered a necessary party. In the instant case, the government would not be foreclosed by a judgment against the Indians. We also submit that in the instant case, the United States in its capacity as guardian, must be interested in enforcing the rights of its Indian wards granted to them under the Treaty of 1855, when so large a part of the ability of the Skokomish Tribe to sustain itself on fish and shellfish is involved and it appears that a state has usurped Indian lands in direct derogation of its pledge not to do so. Thus when a conflict between Indian claims and the claims of white citizens are involved, the United States is a necessary party. It will be deemed not a necessary party only when no preservation of lands restricted for Indians is involved. This quiet title action brought by the Skokomish Tribe will include or exclude from tax-exempt Reservation land the real property in question. With its guardianship interest thus involved, United States is a necessary party. *Shade v. Downing,* 333 U.S. 586, 92 L.Ed. 894 (1948); *Lewis v. Hansen,* 227 P.(2d) 70 [Mont.] (1951). However, for the reasons already stated, it cannot be deemed an indispensable party.

II.

The State of Washington Consented to This Action Against It by Virtue of Its General Appearance and by Virtue of Its Consent Given in Article XXVI of the Washington State Constitution, Said Consent Being a Prerequisite to Statehood

A. We recognize that a state, as a sovereign, can not be sued without its consent. *Cherokee Nation v. Georgia,* 5 Pet. 1, 8 L.Ed. 25 (1831). Consent may arise, however, through legislative pronouncement or by an authorized waiver of such immunity from suit, through appearance and participation in the action. We believe that the State of Washington has consented to this action against it in the manner of its appearance and handling of this lawsuit. Article II, Section 26, of the Washington State Constitution provides that the legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state. RCW 4.92.010 (Chap. 216, Sec. 1, Laws of 1927, amending Chap. 95, Sec. 1, Laws of 1895), provides, in part, that actions to quiet title to real property in which the state is a necessary or proper party defendant *may* be commenced and prosecuted to judgment against the state in the Superior Court of the county in which such real property is situated. It will be noted that the state courts are not the exclusive forum in which such a suit may be brought. Chap. 255, Sec. 194, Laws of 1927 (RCW 79.08.020) provides as follows:

> "*Duty of attorney general.* It shall be the duty of the attorney general, to institute or defend, any action or proceeding to which the state, or the commissioner, or the board, is or may be a party, or in which the interests of the state are involved, in any court of this state, or any other state, or of the

United States, or in any department of the United States, or before any board of tribunal, when requested so to do by the commissioner, or the board, or upon his own initiative.

"The commissioner [of Public Lands] is authorized to represent the state in any such action or proceeding relating to any public lands of the state, except capitol building lands. [1927 c. 255 §194; RRS §7797-1947]."

This statute not only gives the attorney general the authority to defend an action against the state in a court of the United States but makes such his express and unqualified duty. It would appear that this statute is a legislative expression of its consent to be sued in the Federal Court as well as in the state court, especially with reference to the public lands of the state. The statute directs the attorney general to defend actions against the state either when requested to do so by the Commissioner of Public Lands or the Board of State Land Commissioners or upon the attorney general's own initiative.

In response to the summons and complaint filed herein, the attorney general filed a general notice of appearance [Transcript of Record, Page 38]. In *People el rel. Bird v. Detroit etc. Ry. Co.,* 121 N.W. 814, at page 819, the court considered a statute which provided as follows:

"It shall be the duty of the attorney general, at the request of the governor, the secretary of state, the treasurer, or the auditor general, to prosecute and defend all suits relating to matters connected with their departments."

In considering that statute, the court stated:

"The state by these enactments, not only authorized these officers to appear and defend, but made

> it their duty to do so. No discretion was lodged in them. If either refused, mandamus would lie to compel him to act in behalf of the state. It seems to be a rule of common sense and sound reasoning that the principle is responsible for the acts of his agent whom he has not only expressly authorized, but has commanded to act for him."

RCW 79.08.020 is not in any way contradictory to the terms of RCW 4.92.010. The latter statute simply gives a citizen a right to maintain an action in state courts. It does not prohibit such a suit in the Federal court. While the state is ordinarily immune from suit, RCW 79.08.020 has, in effect, authorized actions of this nature in the Federal court and has absolutely commanded the attorney general to defend such actions. This argument has special force in the instant case where the state is involved in its proprietary rather than its governmental interest. See *Pape v. Armstrong,* 47 Wn.(2d) 480, 287 P.(2d) 1018 (1955); *Columbia Steel Co. v. State,* 34 Wn.(2d) 700, 209 P.(2d) 482 (1949). In 49 Am. Jur., States, Territories and Dependencies, Sec. 96, we find:

> "Consent on the part of the state to be sued may be evidenced in a number of ways, including the enactment of a statute especially for that purpose. Such consent may be given or expressly authorized by the state Constitution. Certain limited consent of the state to be sued, namely, to be sued by another state or by a foreign state or country, is deemed to be given in view of Art. 3 of the Federal Constitution as limited by the Eleventh Amendment of the Constitution conferring original jurisdiction on the Supreme Court of a suit in which the state shall be a party. By their adoption of the

> Federal Constitution the several states have consented to be made a party in the Supreme Court of the United States, by virtue of the original jurisdiction conferred on that court.
>
> "A state may waive its immunity from suit, or consent to be sued, in other ways than by a formal declaration of consent in its Constitution or by statute. When it has sufficient interest to entitle it to become a party defendant, its appearance in court is a voluntary submission to its jurisdiction."

See also 42 A.L.R. 1464, 1472; 50 A.L.R. 1408.

When the state made a general appearance in this matter in which it has a proprietary interest and made that appearance also in the light of RCW 79.08.020, it waived its immunity from suit and consented to be a party defendant to the action. Having waived its immunity and consented to the action, it must abide a judgment of the court whether from its viewpoint it be satisfactory or adverse. *Clark v. Barnard,* 108 U.S. 436, 2 S.Ct. 878, 27 L.Ed. 780 (1882); *Great Northern Life Ins. Co. v. Read,* 322 U.S. 47, 88 L.Ed. 1121, 1136 (1944).

B. The State of Washington has also consented to this action against it in view of the impact of the Treaty of 1855 (12 U.S. Statutes at Large 933), the Enabling Act, and the section of the Washington State Constitution (Article XXVI, Sec. Second) which adopts the compact required by the Enabling Act. In the case of *State v. Satiacum,* 50 Wn.(2d) 513, 314 P.(2d) 400 (1957), the Washington Supreme Court was concerned in construing a treaty with the Yakimas, likewise entered into in 1855. We quote at length from that decision:

"Article III of the treaty provides as follows:

" 'The right of taking fish, *at all usual and accustomed grounds and stations,* is further secured to said Indians, *in common with all citizens of the Territory,* and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: . . . ' " (Italics ours.) 10 Stat. 1132.

"Since our decision in this case turns upon the proper construction of this article of the treaty, and since the supreme court of the United States is the only tribunal having the power to interpret authoritatively the United States constitution and treaties made thereunder, we find it necessary to review its decisions relating to the construction of Indian treaties.

"All Indian treaties entered into prior to 1871 were consummated pursuant to Art. II, §2 of the United States constitution. Article VI, commonly referred to as the 'supremacy clause,' provides:

" 'This Constitution, and the laws of the United States which shall be made in pursuance thereof; and *all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby,* anything in the Constitution or laws of any state to the contrary notwithstanding.' (Italics ours.)

"The Supreme Court has consistently held that Indian treaties have the same force and effect as treaties with foreign nations, and consequently are the supreme law of the land and are binding upon state courts and state legislatures notwithstanding state laws to the contrary." (Citing cases)

Thus, the treaty is controlling over the State Constitution and the State Constitution controlling over any claim of state immunity. Again we submit that the treaty must be interpreted in the sense in which it might have been understood by the Indians. See the landmark case of *United States v. Brookfield Fisheries,* 24 F. Supp. 712 (1938). We believe that the Indian would have looked to the federal courts for the protection of his rights and that so technical a concept as a state's immunity from suit would have been lost upon him. See also *Lone Wolf v. Hitchcock,* 187 U.S. 565, 23 S.Ct. 221, 47 L.Ed. 306 (1903).

There can be no question but what the State of Washington submitted itself to the jurisdiction of the federal courts when the people stated, in Article XXVI, § Second of the Washington State Constitution, that until the title to Indian land shall have been extinguished by the United States the same shall be and remain subject to the *disposition* of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress. It should not be forgotten that this section of the Washington Constitution must be considered with the oft-repeated rules that (1) what a state acquires by its Enabling Act is subordinate to the Indians' prior right of occupancy and (2) treaties between the Federal Government and Indian Nations have force and effect superior to that of the acts of state legislatures. *U. S. v. O'Brien,* 170 Fed. 508 (1904); *State ex rel. Irvine v. District Court,* 239 P.(2d) 272 [Mont.] (1951); *Anthony v. Veatch,* 220 P.(2d) 493 [Ore.] (1950). We also believe that had the United States properly assumed its duty by becoming a party to

this action, the reasoning of the *United States v. State of Washington,* 233 F.(2d) 811 (1956), would have applied with full force, insofar as the assumption of jurisdiction over the person of the State of Washington is concerned, even though trust lands are there involved.

It may be argued that the state has consented to suit but only in the state courts and pursuant to the Washington statute, but this matter deals with Indian *lands* which presents a special situation, and the United States has reserved jurisdiction over all Indian reserve lands under the Enabling Act, to which the people of the State of Washington have consented in the Washington State Constitution. *Vermillion v. Spotted Elk,* 85 N.W.(2d) 432 [N.D.] (1957). The *Vermillion* case involved the Enabling Act we have been discussing, which allowed North Dakota, South Dakota, Montana and Washington to become states. The same provision is to be found in the North Dakota Constitution as is contained in ours. Though the point is not directly involved, that opinion indicates that the Enabling Act and the disclaimer in the comparable section of the North Dakota State Constitution can be held to have reserved to the United States jurisdiction involving Indian lands. The jurisdiction in such matters being reserved to the Federal courts, it would be illogical to say that the Indian's remedy to enforce their rights in their lands is non-existent. Therefore, by virtue of the general appearance of the State in this action to protect a proprietary claim; by virtue of the submission to the jurisdiction of the United States and the waiver of immunity from suit by Indians endeavoring to protect their Reservation lands, both of which were required by

the Enabling Act as a condition of statehood; and by virtue of reason and common sense we feel that the State of Washington has submitted itself to the jurisdiction of the Federal courts and should not be dismissed as a party defendant. It would be a travesty of justice if the State, having entered a solemn compact to respect the rights of Indians to their lands, were to be permitted to nullify this guaranty by asserting a claim of immunity from suit. It must be held to have consented to suit to enforce the rights it vowed to observe—or its covenant is meaningless. Article I, Section 10, United States Constitution.

III.

Appellants Are Not Foreclosed by a Prior Acting Pending in the Superior Court of the State of Washington for Mason County Since the Issues There Presented Are Not Identical to the Issues Here Presented and the Proper Forum for the Cause Is the Federal Court

When action was commenced in the Superior Court of the State of Washington for Mason County, the main prayer of the plaintiff therein was for a determination of boundaries by a commission appointed by that court. Here the main prayer of the complaint is to quiet title in the Skokomish Indian tribe of all tidelands pertinent to the reservation uplands and which were granted to it by the treaty. A number of parties not involved in the present action are named before the Suprerior Court of the State of Washington.

As stated, the present action is premised upon the rights of the Skokomish Indian tribe founded on a claim in writing under a treaty of the United States. In this connection, the Act of June 25, 1948, 52 Stats. at Large 937, 248 U.S.C.A. 1441, provides in part as follows:

> "(b) A civil action of which the District Courts have original jurisdiction founded on a claim or right arising under the constitution, treaties or laws of the United States, shall be removable without regard to the citizenship or residence of the plaintiffs. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the state in which such action is brought."

It is thus seen that this action even if commenced in the Superior Court would be removable to the Federal District Court. Therefore, the District Court properly has jurisdiction over the subject matter since neither the parties or the issues are identical.

IV.

The District Court Had Jurisdiction to Hear and Try the Issues and in Fact Is the Sole Forum Before Whom the Issues Could Be Presented

This action is one arising under a treaty and at least $3,000 is involved. It arises under the treaty of 1855 [12 U.S. Stats. at Large 933] and all the tidelands involved exceed in value $3,000 (Tr. of Record p. 49).

The problem of jurisdiction is set forth in 12 A.L.R. (2d) 29, as follows:

> "In order to vest * * * jurisdiction on the ground that the case is one arising under the constitution, laws or treaties of the United States, the authorities unanimously agree that the asserted or alleged Federal question must be real and substantial."

There can be no question but what the interpretation of this treaty is involved, dealing as it does with whether or not certain lands are included within the reservation

set aside for the Skokomish Indian tribe. Many cases have concerned themselves with the same question and Federal jurisdiction has never been doubted. See *Alaska Pacific Fisheries v. United States,* 228 U.S. 78; *Moore v. United States,* 157 F.(2d) 760 (1946).

We have set forth in the Appendix that section of Article VI of the Constitution of the United States which makes treaties of the United States secondary only to the Constitution of the United States. In *Seufert Bros. Co. v. United States,* 249 U.S. 194, 39 S.Ct. 203 (1919) the ownership of fishing rights located perhaps twenty-five miles from the Yakima Reservation was confirmed in the Indians, the court stating as follows:

> "As stated by counsel for the appellant, the most important question in the case is this: 'Did the treaty with the Yakima tribes of Indians ceding to the United States lands occupied by them, on the north side of the Columbia River in the territory of Washington, and reserving to the Indians "the right of taking fish at all usual and accustomed places in common with citizens of the territory," give them the right to fish in the country of another tribe on the south, or Oregon, side of the river?' "

We urge that since the United States Supreme Court could confirm the right of a tribe to fish twenty-five miles from the boundary of the Yakima Reservation, which Reservation was created by a similar treaty [12 U.S. Statutes at Large 951 (1855)], that a substantial question was there involved and is likewise involved here. A substantial Federal question being involved, jurisdiction of the Federal courts to construe the Treaty of 1855 with the Skokomish to include the tidelands adjacent to their reservation is established. We note

that similar inclusions of area were accorded in *Moore v. U. S.*, 157 F.(2d) 760 (1946); *State v. Edwards,* 188 Wash. 467, 62 P.(2d) 1094 (1936) and many other cases.

As we have pointed out and as can be seen from the constitutions and treaties set forth herein, the exclusive right of fishing of the Skokomish Indian tribe was to be free from interference from the State of Washington or any person or persons claiming under or by virtue of any title granted them by the States of Washington, the lands in the reservation of the Indians were to be free from such interference and the protection of these rights was to be found in the exclusive jurisdiction of the United States.

In 28 U.S.C.A. §1360 we find:

> "(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the state, except the Warm Springs Reservation.

Wisconsin.....All Indian country within the State.

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

" * * * "

The legislative history of this Act adopted in 1953 is enlightening on our problem of the jurisdiction of the Federal court, indeed the exclusive Federal jurisdiction, of this couse. The legislative history reads in part as follows:

"Your committee has amended the printed bill by adopting substitute language which operates to * * *

"(2) Give consent of the United States to those states presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws.

"Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota,

Utah and Washington. Effect of the disclaimer of jurisdiction over Indian land within the borders of these States in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, proceed to amendment of their respective organic laws by proper amending procedure." 1953 U.S.C.C. & A.N., Vol. 2, p. 2412.

In a letter from the Assistant Secretary of the Interior written on July 7, 1953, which likewise appears in legislative history, we find the following statement:

"It appears that there are legal impediments to the transfer of jurisdiction over Indians on their reservations in the case of a number of States. An examination of the Federal statutes and State constitutions indicates that enabling acts for the following States, and in consequence the constitutions of these States, contain express disclaimers of jurisdiction. These States are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington. In these cases the enabling acts required the people of the proposed States expressly to disclaim jurisdiction over Indian land and that, until the Indian title was extinguished, the lands were to remain under the absolute jurisdiction and control of the Congress of the United States. In each instance the State constitution contains an appropriate disclaimer. It would appear in each case, therefore, that the Congress would be required to give its consent and the people of each State would be required to amend the State constitution before the State legally could assume jurisdiction." 1953 U.S.C.C. & A.N., Vol. 2, p. 2414.

The lands here in question are subject to a restriction against alienation, which has been imposed by the United States. We submit that the Superior Court of the State of Washington has no jurisdiction to adjudicate the ownership or right to possession of this property of the Skokomish Indian Reservation or any interest therein. We further submit that the jurisdiction of the Federal Court is clear and that the District Court should be directed to hear and try the issue on the merits.

* * *

SUMMARY OF ARGUMENT and CONCLUSION

We submit that the District Court erred in failing to rule that the United States was a necessary party to the action though not an indispensable one. The United States is not indispensable since the Skokomish Tribe has the capacity to sue in its own behalf. The United States is necessary as a party because it will not be foreclosed by any judgment in this action unless it is a party, because it is its sacred duty to uphold its Treaty obligations to the Skokomish Tribe, and because it is its duty to protect the reserved lands of its dependent Indian wards.

We submit the District Court erred in dismissing the State of Washington as a defendant in view of its general appearance and the consent to suit which was required of the State in consideration for its admission into the Union.

It is also our conclusion that the District Court erred in considering that any action pending in a Washing-

ton State Court would bar the present action. We do not believe this is part of the basis upon which the District Court dismissed the action, but it may have been a consideration and we believe that such a consideration is refuted by our argument herein.

We are at a loss to understand upon what grounds the District Court dismissed the balance of the litigation since the exclusion of the United States and the State of Washington does not preclude the appellant from its remedy against the encroachment of the remaining parties.

We ask that the Order of Dismissal of the District Court be reversed, that the United States be held to be a necessary party to the action and required to join as a party plaintiff, that the State of Washington be restored as a party defendant, and that the District Court be instructed to try the cause on its merits.

Respectfully submitted,

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APPENDIX

Constitution of the United States, Article VI

"DEBTS, SUPREMACY, OATH. * * *

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

" * * * * ."

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12 United States Statutes at Large 933

Treaty between the United States of America and the S'Klallams Indians. Concluded at Point no Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 29, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES OF AMERICA:

To all and singular to whom these presents shall come, Greeting:

WHEREAS a Treaty was made and concluded at Hahd Skus, or Point no Point, in Washington Territory, on the twenty-sixth day of January, eighteen hundred and fifty-five, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen, and Delegates of the different villages of the S'Klallams Indians, viz.: the Kah-tai, Squah-quaintl, Tch-queen, Ste-techtlum, Tsohkw, Yennis, El-hwa, Pishtst, Hunnint, Klat-la-wash, and Okeno, and also of the Sko-ko-mish, Too-an-hooch, and Chema-kum tribes occupying certain lands on the straits

of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to-wit:

Articles of agreement and convention, made and concluded at Hahdskus, or Point no Point, Suquamish Head, in the Territory of Washington, this twenty-sixth day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the different villages of the S'Klallams, viz.: Kah-tai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsohkw, Yennis, Elhwa, Pishtst, Hun-nint, Klat-la-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch and Chem-a-kum tribes, occupying certain lands on the straits of Fuca and Hood's Canal in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

Article I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their rights, title, and interest in and to the lands and country occupied by them, bounded and described as follows, *viz.*: commencing at the mouth of the Okeho River, on the Straits of Fuca, thence southeastwardly along the westerly line of Territory claimed by the Makah tribe of Indians to the summit of the Cascade Range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' portage; thence northeastwardly, and following the line of lands heretofore ceded to the

United States by the Dwamish, Suquamish, and other tribes and bands of Indians to Suquamish Head; thence northerly through Admiralty Inlet to the Straits of Fuca; thence westwardly through said straits to the place of beginning; including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, *viz.*: the amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so.

ARTICLE III. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime, it shall be lawful for them to reside upon any lands not in the actual claim or occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

ARTIQLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the pur-

pose of curing; together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. *Proveded, however,* That they shall not take shellfish from any beds staked or cultivated by citizens.

ARTICLE V. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

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ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof; and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe, except in self defense, but will submit all matters of difference between them and other Indians to the government of the United States, or its

agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities.

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48 United States Statutes at Page 984

73d Congress Sess. II Ch. 576

AN ACT

To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That hereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

Sec. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

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Sec. 4. Except as herein provided, no sale, devise, gift, exchange or other transfer of restricted Indian lands or of shares in the assets of any Indian tribe or corporation organized hereunder, shall be made or approved: *Provided, however,* That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian

tribe in which the lands or shares are located or from which the shares were derived or to a successor corporation; and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located or in which the subject matter of the corporation is located, to any member of such tribe or of such corporation or any heirs of such member:

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Title to any lands or rights acquired pursuant to this Act shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

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Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ

legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Sec. 17. The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: *Provided,* That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.

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Indians of the Pacific Northwest

The following is from *Indians of the Pacific Northwest,* 1945, Bureau of Indian Affairs, Dr. Ruth Underhill:

Indians of the Pacific Northwest is primarily devoted

to the coastal strip from the Cascades to the Pacific Ocean and from the Canadian boundary to the northern California boundary, pp. 9-10.

> "In all this country, the way of life was much the same, though many different tribes lived there." p. 9.

The Skokomish or Twanoh are identified as one of the coast tribes and belonging to the Salish language group, p. 13.

The extensive use of the shellfish is described at pages 28-30 and includes:

> "SHELLFISH.
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> "The big fish were caught by men but there were some kinds of sea food usually gathered by women. Among these were shellfish: clams, rock oysters, mussels and barnacles found on the rocks revealed at low tide. Groups of women went out after these with their baskets, just as they went for berries, and dried them by the bushel for winter use. There are stories of lost girls with no man to fish for them, who live very well on the seafood they got for themselves.
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> "Chief of these was the clam, in at least six varieties, listed at the end of this chapter. It was the Indians who taught Northwest pioneers where to find these clams and how to appreciate them. They must have been a food of coast peoples for thousands of years for Copalis, a favorite Indian beach of the Washington coast, has heaps of clam shells many miles long and many feet deep.
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> "Groups of families used to journey to such a beach in June and July, when the clams are at their best and milkiest. If they had a beach near home the women and children would walk to it every

day or else paddle there in canoes. Sometimes they had slaves to help them. The tale is that Raven, when he was a slave, stole the South Wind's daughter and thus made him stop sending storms, for these drove the tide too far up the beach and the clams were never uncovered.

"Women had special baskets for clam gathering (E, p. 63). These were cleverly made of openwork, which allowed the water to drip out, making the worker's load lighter with every step she plodded toward home.

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"At low tide women might find crabs in the pools, particularly those called soft shelled because in summer, when the shell is changing, it is so soft that it can be boiled and eaten with the crab. The larger ones lived in deep water where the men went out in canoes to dip them up by the netful. Such crabs are a feature of coast restaurants today.

"Up the streams, the women could get herring eggs. They might scrape these off the sticks and stones at the bottom of a stream, where the fish liked to lay them, but a better way was to prepare the ground by laying cedar branches under the water. After the spawning season, the branch would be found full of eggs and each woman could pull out her own and take it home."